*United States Court of Appeals*

*for the Second Circuit*

# PETITIONER'S REPLY BRIEF

# 76-4179

## United States Court of Appeals

FOR THE SECOND CIRCUIT

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THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
*Petitioner,*

v.

THE FEDERAL TRADE COMMISSION,
*Respondent.*

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ON PETITION FOR REVIEW OF ORDER OF THE FEDERAL TRADE COMMISSION

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# REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

This reply brief is submitted on behalf of The Great Atlantic & Pacific Tea Company, Inc. ("A&P") in response to the brief submitted by the Federal Trade Commission ("Commission" or "FTC") dated January 1977.[1]

We do not quarrel with the FTC's statement that review of the Commission's determination is governed by the substantial evidence rule (FTC Br. 13-14). However, the Commission's treatment of this rule in its brief implies that this Court's inquiry must cease if there is evidence to support the Commission's order, and other evidence favorable to A&P need not be considered. This is erroneous. As the Supreme Court said in *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 488 (1951): "The substantiality of evidence must take into account whatever in the

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[1] A&P's initial brief and the Commission's brief are abbreviated "A&P Br." and "FTC Br." "A" refers to pages in the Appendix. The numbers following a witness' name are page numbers of the transcript below which are not contained in the Appendix.

record fairly detracts from its weight." *Accord, Exposition Press, Inc.* v. *FTC,* 295 F.2d 869, 872 (2d Cir. 1961), *cert. denied,* 370 U.S. 917 (1962), and *Sandura Co.* v. *FTC,* 339 F.2d 847, 859-60 (6th Cir. 1964), where the Court explained: "Standing alone, these two pieces of evidence might well be sufficiently substantial to support the Commission's position. When set in the context of the record as a whole, however, they are inadequate to support an order. . . ." When the findings and conclusions of the opinion below are subjected to proper scrutiny, "in the context of the record as a whole", it is submitted that they are totally inadequate to support Count II of the complaint.

The relevant facts have been summarized in our initial brief (A&P Br. 4-22) in sufficient detail to expose most of the material omissions and unfounded characterizations and conclusions in the Commission's statement of the facts. In the interest of brevity, we will not attempt to catalogue all of these inaccuracies here but will only refer briefly below to those misstatements which are relevant to a proper resolution of the legal issues. In general, however, it should be noted that the Borden-A&P negotiations were by no means the unequal contest portrayed in the FTC's brief. Instead, Borden, an industry giant which had been A&P's virtually exclusive dairy supplier in Chicago for over six years, (a) faced competition from only a few dairies which had older and much less efficient plants, (b) was represented in these negotiations by a skilled team of salesmen dealing with a new and unsophisticated A&P buyer, and (c) was the only one with knowledge of its costs and did not hesitate to misstate these costs as a bargaining device or "sales tool" (A&P Br. 5-6, 9-10, 13-14). It is thus revealing when the Commission adopts an attitude of partisan indignation that A&P would "put the matter up for outside bids" (FTC Br. 9), particularly since only one dairy (Bowman) would even make a competing offer to A&P (A&P Br. 10).

## ARGUMENT

The FTC's brief professes to see "nothing inconsistent between the Commission's view that a buyer is not required to disclose to any supplier [i.e., A&P was not required to tell Borden] the fact that a meeting competition defense is not available for purposes of Section 5, while finding that A&P unlawfully induced or received price discriminations under Section 2(f)" because it did not make such a disclosure (FTC Br. 37). Since the Commission was dealing with the very same set of facts in both rulings, and since it found that condemning A&P's conduct under Section 5 would be "contrary to normal business practice and, we think, contrary to the public interest" (A1027), we submit that the inconsistency is obvious. One cannot on the one hand maintain that it would be contrary to the public interest to prohibit accepting in silence a bid that "beats" another bid when it is offered on a "meeting competition" basis, while at the same time insisting that the same conduct is a serious Robinson-Patman Act violation which subjects the buyer to more severe penalties, including treble damage actions.

### I.

### A&P Was Erroneously Deprived of the "Meeting Competition" Defense.

In response to A&P's argument that it is entitled to the benefit of Borden's meeting competition defense (A&P Br. 28-33), Commission counsel assert: "In the first place it is by no means clear . . . that Borden would have had a meeting competition defense" (FTC Br. 37). It is clear, however, that there was no finding that Borden did not have such a defense, and that this essential element of the case against A&P is lacking (see A&P Br. 30-31).[2]

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[2] "Substantial evidence . . . must do more than create a suspicion of the existence of the fact to be established." *Rayex Corp.* v.

### A. The Order Cannot Be Justified Under the *Kroger* Case.

Commission counsel seek to expand the Commission's own findings in an attempt to bring the instant case within the parameters of *Kroger Co.* v. *FTC,* 438 F.2d 1372 (6th Cir.), *cert. denied,* 404 U.S. 871 (1971), which created a "lying buyer" exception to the requirements of Section 2(f). While complaining that Borden "was unable to get any concrete idea from A&P as to what the competitor had bid" (FTC Br. 9), they argue that A&P "misled Borden into believing the final offer was merely meeting competition, whereas in fact it was substantially beating the competitive offer of Bowman" (FTC Br. 39). When Borden was "led to believe" that A&P had a competitive offer, as a matter of indisputable fact A&P had an offer from Bowman which was clearly lower than Borden's outstanding offer (A&P Br. 11-13).[3] Thereafter, as the Commission acknowledges, "A&P never informed Borden of the amount of Bowman's bid" (FTC Br. 38). Thus the real complaint against A&P is not that it had a "lying buyer" but that it had a "silent buyer" whose silence was found by the Commission to be consistent with normal business practice and with the public interest (A1027).

In an effort to salvage their case, Commission counsel now attribute misrepresentations to A&P based on certain alleged remarks ("no glass gallons" and "sharpen your

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*FTC,* 317 F.2d 290, 292 (2d Cir. 1963), quoting from *NLRB* v. *Columbian Enameling & Stamping Co.,* 306 U.S. 292, 300 (1939).

[3] Borden's initial proposal offered estimated annual savings of $410,000; on the same basis, the Bowman offer would have saved A&P at least $737,000 per year (A3479-80; A&P Br. 13). Commission counsel's contention that Borden's offer was not responsive to Bowman's proposal but was "responsive to the threat that it would lose A&P's business if it did not sufficiently lower its own bid to the satisfaction of A&P" (FTC Br. 38-39) ignores the fact that A&P had only one other possible source of supply, as well as the Commission's own specific findings that the Bowman bid was both operative and comparable to Borden's (A1039, n.17).

pencil") by A&P buyer Schmidt to Borden salesman Tarr. While there is some dispute as to what Mr. Schmidt said about glass gallons and whether he ever used the phrase "sharpen your pencil", it is indisputable that any such remarks were not material. Borden had clearly decided to offer $820,000 in estimated annual savings to A&P, whether or not glass gallons were put up in private label.[4] Similarly, if the "sharpen your pencil" comment was made and had any significance at all, Tarr himself testified that it did not result in any "material", but only "an insignificant or slight, if any, change" in Borden's subsequent offer (Tarr 1001-02).[5]

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[4] In fact, A&P vigorously denies that there was any misrepresentation at all. The glass gallon comments were discussed in our main brief (see A&P Br. 15-16). The only dispute there is is to *why* A&P did not want the gallon jugs in private label. A&P's reason(s) could have no adverse impact on Borden, and the *fact* that the gallon glass items were not included benefited Borden by (a) allowing it to charge A&P over $100,000 more per year for regular milk in jugs than Bowman would have charged and (b) suppressing this unfavorable comparison.

[5] Mr. Tarr testified at the hearing (for the first time) that he was told by Schmidt at some stage of the negotiation to "sharpen your pencil a little bit because you are not quite there" (A932) and, as a result, some "insignificant" adjustments were made in by-product prices. No other witness heard this remark, and Tarr himself never mentioned it previously in his detailed accounts of these negotiations in the precomplaint investigation and prehearing deposition (A4462-71; Tarr 966-82).

Tarr acknowledged at the hearing that he was not sure when this alleged remark was made, and he "may not have things in proper sequence, as far as the private label negotiations are concerned" (Tarr 983-84). Since the adjustment in by-product prices to which he referred was made in August (A3236, 3341), and the record shows that no such adjustment was made in September, it seems much more likely that any such remark (if it was made at all) was made at the time prior to the previous offer and had no effect at all on the final offer. Moreover, even assuming that Mr. Schmidt did state that Borden should "sharpen its pencil because it was not quite there yet" near the end of the negotiations, that statement would have been entirely accurate since the fact is that Borden's September 14, 1965 glass gallon quotation clearly did not meet the Bowman quote—whether the two are compared with glass gallons out or in (A1162, 1922, 1924, 3419-42, 3479-80, 5105).

The Commission itself found these specific "misrepresentations" to be irrelevant to the charge (A1026, n.5). Although Commission counsel now assert that they were found irrelevant only to the Count I charge (Section 5 of the FTC Act), it is clear from the Commission's opinion that it found them equally irrelevant to the Count II, or Section 2(f), charge based on the same negotiations. The opinion simply does not rely on any findings of misrepresentation to support its conclusion. Accordingly, we submit that Commission counsel may not now shore up the result below by injecting such charges here. A reviewing court may not affirm an administrative agency's order on grounds other than those adopted by the agency.[6]

In their effort to justify applying the holding of *Kroger Co.* v. *FTC, supra,* to the instant case, Commission counsel assert a chronology of events that clearly does not square with the facts here. In *Kroger,* the supplier's final offer came after the buyer (Kroger) advised it of a purported competing offer which, in fact, had been fabricated by the buyer. The FTC brief asserts that A&P, after obtaining a competitive bid, would not tell Borden the competitive price offered but "induced Borden to make another bid on the basis of meeting competition when A&P knew the final Borden offer was substantially lower than the Bowman offer" (FTC Br. 41). Obviously, at the time that Borden was advised that it could submit a second bid, Borden was not given a price to bid against and A&P could not have known that the second Borden bid would be lower than the Bowman bid (if in fact it was). Therefore, A&P cannot be charged with knowingly inducing any illegal price *or* with any misleading misrepresentation.

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[6] "A reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *SEC* v. *Chenery Corp.,* 332 U.S. 194, 196 (1947).

### B. A&P Did Not Accept This Offer on a "Meeting Competition" Basis.

The Commission also asserts that Borden's offer was accepted by A&P after Borden had "specifically informed A&P that the price was based on a meeting competition basis only" (FTC Br. 40). This is a gross distortion of the record. Borden did not notify A&P in any meaningful way that its bid was a "meeting competition" bid, let alone that it was based "solely" on meeting competition. Borden did not mention meeting competition in its final offer or in any other writing submitted to A&P, nor did it request any assurances from A&P of the bid's legitimacy as a meeting competition bid. At best, Borden's salesmen made oral mention of meeting competition to the lowest ranking A&P representative with whom they had contact (Elmer Schmidt), who did not understand it as anything sufficiently significant to mention to anyone else at A&P (A&P Br. 18).[7] During the course of the private label negotiations, Minkler met several times with Ira Bartels (Schmidt's superior), and their superiors (Archer of Borden and Smith of A&P) also met in New York. Admittedly, no one from Borden made any effort to inform Bartels or Smith that Borden's final offer was submitted on a meeting competition basis (A1089-90, 2024; Minkler 382-83).

The claim that Borden "specifically informed A&P" that its final offer was given *only* on the basis of meeting competition is founded entirely on testimony by Ralph Minkler (at the hearing below, but not before) that he so informed Mr. Schmidt at the Libertyville VFW Hall meeting

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[7] Commission counsel's claim that Mr. Schmidt admitted that Borden told him "in many other conversations that the final bid was based upon 'meeting competition'" (FTC Br. 11) is totally inaccurate and cannot be found or even implied in the testimony of Mr. Schmidt (A1893-912) cited in the FTC's brief in support of this contention. The essence of that testimony is quoted at pages 17-18 of A&P's main brief.

(A1743).[8] But none of the other witnesses who testified in this proceeding recalled any such comment, and it is not mentioned in any of the allegedly complete and contemporaneous handwritten memoranda prepared by Joseph Malone of Borden. In addition, there was no reference to meeting competition in the Borden letter of legality dated October 1, 1965 (A4460).

Commission counsel also misstate the record by their assertion (FTC Br. 40) that Schmidt stated that "the offer was being accepted on that basis" (*i.e.*, on the basis of meeting competition). Mr. Schmidt testified that Borden representatives had used the phrase "meeting or beating competition" during the course of the negotiations, but he considered such comments to be purely "salesman's talk", attributed no special significance to them, and never informed his superiors of such references (see A&P Br. 17-18, 50). If Mr. Schmidt had knowingly accepted the final Borden bid on the sole basis of "meeting competition", he would not have requested (as the Commission admits he did) an availability letter (*i.e.*, that Borden's prices to A&P would be made available to other customers of Borden on a proportionally equal basis). The inescapable conclusion is that Mr. Schmidt honestly did not appreciate the significance of any Borden statements pertaining to meeting competition (assuming such statements were in fact made) and that A&P did not accept the final Borden offer on such a basis.[9]

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[8] During his pre-hearing deposition testimony, even Mr. Minkler did not state that meeting competition was the only basis on which Borden offered its private label proposal to A&P.

[9] Commission counsel also note that A&P was advised by Borden that the competing bid was probably based on "anyhow accounting", *i.e.*, a procedure which fails to make a proper allocation of all costs (FTC Br. 9, 39). While the FTC brief exaggerates the frequency and significance of such remarks, the more significant fact for present purposes is that there was no evidence that Borden ever told A&P that *its* final bid was based on this practice. Mr. Minkler categorically testified that at no time did he tell Mr.

### C. The Borden Offer Was No Lower Than the Bowman Offer.

In an attempt to dispute A&P's assertion that the Borden offer was either less favorable than or substantially equivalent to the Bowman offer, the Commission claims that A&P's comparison of the two bids at the hearing in 1973 included "a different product line and . . . butterfat level than that offered in 1965" (FTC Br. 41), and so is based on "speculation" (FTC Br. 42-43). Even if some adjustment in the bids was necessary to compare them, and even if (as the FTC brief argues) A&P was only interested in "price" when it compared the two bids in 1965, A&P's later comparison is clearly correct and the superficial comparison prepared by Mr. Schmidt in 1965 was clearly wrong (see A&P Br. 33-36). Moreover, A&P did not have to introduce new "factors" not included in the 1965 offers when it made its later comparison of them; rather, it has used the 1965 offers of both Borden and Bowman and put them on the same basis so that the "real" prices in both proposals could be meaningfully compared.

The Commission argues that A&P's adjustment of the butterfat content in Borden's offer (from 3.4% to 3.5%, the butterfat content used by Bowman in its bid) is based on "speculation" because A&P "did not have a Borden bid which offered a 3.5% butterfat level" (FTC Br. 43). But in fact the butterfat adjustment used by A&P in this comparison was actually taken from Borden's final bid (A3468).[10] Since Borden's prices to A&P were subject

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Schmidt or anyone from A&P that Borden's offer of $820,000 in cost savings was based on "anyhow accounting" (A1723-24, 1792; Minkler 373).

[10] It was a standard practice of dairies to adjust the butterfat content of their milk products at the request of a customer such as A&P (A2021, 3524; Schmidt 1826-27). Mr. Minkler, during his testimony, calculated the additional cost that A&P would have to pay Borden if A&P wanted a 3.5% butterfat content (Minkler 339-40). In the face of this uncontradicted evidence, the FTC

to automatic adjustment under a formula based on the price of raw milk (A4715-49), and since the Borden bid itself, on several pages entitled "Formula Price For Raw Milk" (A3465-72), states the raw milk price in terms of milk having 3.5% butterfat and then reduces that price on the stated basis that the butterfat content is to be reduced from 3.5% to 3.4%, there is no speculation involved in adjusting Borden's price back up to the 3.5% level to compare it with Bowman's (which contemplated no such reduction in butterfat). Moreover, Mr. Cannon (who testified without contradiction and whose testimony would have been confirmed by two deceased witnesses, according to the Administrative Law Judge) stated that Bowman would have made a reduction from the 3.5% butterfat content, and a corresponding reduction in price, if requested to do so by A&P (A2316-18).

The Commission claims that "company records reveal that the butterfat level in the Bowman offer was not 3.5%" (FTC Br. 42, n.16). But Mr. Cannon testified that Bowman's offer to A&P was for the 3.5% butterfat content because that was what Bowman had supplied to A&P until 1958 (A2315-16, 2389). Thus the Commission's claim is unfounded, as is its further contention that Bowman did not have to supply milk "at any particular butterfat level" (FTC Br. 42, n.16).[11]

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brief argues (with no support from the record) that Borden was so desperate to retain A&P's business that it would not have raised its prices in accordance with the formula in its final bid, even if A&P had asked for a higher butterfat content. This argument is obviously sheer speculation.

[11] In fact, Mr. Cannon testified that (i) while the bid itself did not specifically spell out 3.5% butterfat, his covering letter did, (ii) while Bowman could have gone down to the legal limit of 3.25%, it was his "recollection and belief" that Bowman offered A&P a 3.5% butterfat content, and (iii) if the butterfat content was reduced, Bowman would have given A&P lower prices in accordance with the butterfat taken out (A2349, 2381). It is therefore quite irrelevant that the Bowman milk sold to others in 1965 may have contained a butterfat content less than 3.5%.

The Commission's brief also claims that the Bowman bid would have been subject to unspecified increases due to A&P's volume being lower than anticipated (FTC Br. 43), an argument adequately negated in our main brief (A&P Br. 36, n.36). In response, the Commission notes that Mr. Cannon "did not say there would be no price increase if there were a substantial variance" from the $1 million figure (FTC Br. 43, n.17). Apart from the fact that there is very little probative value in what Mr. Cannon did *not* say, it should be noted that Mr. Cannon *did* testify that the quoted prices were firm if Bowman could supply all of the A&P Chicago Unit stores on Mr. Schmidt's list (A&P Br. 11-12).

In a final effort to deny A&P the benefit of the meeting competition defense, the Commission urges repeatedly that the facts are irrelevant since in any event A&P *believed* the Borden bid to be "substantially better" (*e.g.*, FTC Br. 42-44). The only evidence cited by the Commission in support of this conclusion is the single use of the term during the lengthy testimony of Mr. Herschel Smith, A&P's headquarters dairy buyer, to describe what Mr. Schmidt's inaccurate analysis of the bids might lead one to conclude. That portion of Mr. Smith's testimony, containing his simultaneous clarification that "the difference [between the bids] was almost infinitesimal", is quoted in our initial brief (pp. 37-38). This excerpt clearly indicates that Mr. Smith, the A&P official who finally approved the private label agreement with Borden, believed that there was only "a matter of mills" difference between the two bids.

Even if the Commission's subjective theory (which focuses on A&P's state of mind as to relative values in 1965) were accepted, Mr. Smith's belief would be the critical fact, and his testimony (which is the only evidence of it) was as follows:

> "Q. Now, again going back to Mr. Stone's question about after taking various steps you finally accepted this quotation, what was the next step?

"A. I sent it to the Legal Department for their approval.

"Q. And after that?

"A. Then I called the Chicago people out there, Bartels, to tell him that this was approved and he could accept it, he could put it into motion.

"JUDGE HINKES: Did you call or did you write?

"THE WITNESS: I called and confirmed it, sir.

"By Mr. McInerney:

"Q. Now did you compare at that time the Bowman prices and the Borden unit prices on the various products? In other words, you had two bids, two quotes, before you and did you look to see what the prices were per quart, half gallon and gallon on each of those quotations and compare the two of them?

"A. I observed that the Bowman and Borden quotations were very close to each other, that the gallons and half gallons were quite close. The quart, as a matter of fact, that Bowman was lower than Borden, and on the half gallons and gallons the difference was almost infinitesimal, it was so small." (A2017-18)

In any event, we submit that the objective fact is controlling here, and the objective fact is that the Borden bid was not "substantially better" than Bowman's. That is readily demonstrated by a comparison (set forth at p. 16 of our initial brief) of the actual prices quoted, without any adjustment. These indisputable figures show only insignificant (6/10ths of a mill per quart) differences between the two offers. Accordingly, even if Mr. Smith had been misled (by Mr. Schmidt or Mr. Bartels, who were in turn influenced by Borden's sales efforts) into believing that Borden's prices were substantially better than Bowman's, that could afford no basis for the decision below.

The Commission's claim that "a few mills difference per point over millions of points will amount to a substantial

difference" (FTC Br. 44, n.18) misses the point. Regardless of how one characterizes the difference between the two bids, it was at the *most* 6/10ths of a mill, or about ⅓ of 1%, on a per quart basis, and on the basis of the total price only $82,000, or about 1.5%.[12] While A&P never realized the $82,000 saving (because of reductions in both A&P's sales and Borden's brand prices), even 1.5% is certainly not significant in terms of two suppliers offering much larger discounts (26% and more, A3571-73, 3580) to all volume customers, particularly when dairy items constitute only a part of the customers' total line of goods.

Viewing this difference against the standard which the courts have come to apply in determining whether a competing bid is sufficiently responsive to make the meeting competition defense available, it is clear that even a 1.5% difference would not bar that defense here. It was established in the landmark Supreme Court case of *FTC* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945), that a seller need not show that its price in fact met an equally low competitive price, but only that the price was a good faith attempt to do so.[13] As the Commission wrote in *Continental Baking Co.*, 63 F.T.C. 2071, 2163 (1963):

> "At the heart of Section 2(b) is the concept of 'good faith'. This is a flexible and pragmatic, not technical or doctrinaire, concept. The standard of good faith is simply the standard of the prudent businessman re-

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[12] This percentage is calculated on the total price of $5,600,000 which A&P was then paying Borden per year for the 11 items to be furnished in private label. We noted in our main brief (p. 15, n.16) that the more appropriate total dollar comparison would be to compare the estimated savings with the approximately $7,500,000 that A&P was paying Borden for the 22 items (private and brand label) which were to be sold to A&P under the severely limited delivery conditions.

[13] As we noted in our main brief, throughout the hearing Commission counsel and the Administrative Law Judge proceeded on the basis that Borden's final offer was made in good faith to meet competition (A&P Br. 14-15, n.15).

sponding fairly to what he reasonably believes is a situation of competitive necessity."

If a seller intended only to meet a competitive price, the fact that it actually beat the price does not destroy its defense. *International Air Industries, Inc.* v. *American Excelsior Co.,* 517 F.2d 714, 726 (5th Cir. 1975), *cert. denied,* 424 U.S. 943 (1976); *cf. Samuel H. Moss, Inc.* v. *FTC,* 155 F.2d 1016 (2d Cir. 1946) (per curiam); *see also* A&P Br. 39-40. The situation in *International Air Industries, supra,* is particularly relevant. There, unlike the instant case, the defendant's price substantially undercut the competitive offer; it "beat" the competing offer of a 14.5% discount by offering a discount of 25% below list price. The competitor met this reduction and the defendant offered a 32.5% discount, undercutting its rival a second time. The Fifth Circuit held that the defendant's response was fair under the circumstances and that the undercutting did not vitiate the meeting competition defense. Thus, even under the Commission's contention that the Borden bid was "substantially" better than the Bowman bid (which we vigorously deny), the meeting competition defense would still be available both to Borden and to A&P.

In this regard, while Commission counsel attempt to distinguish other authorities cited by A&P, it seems significant that they do not comment on the Commission's own *Beatrice* decision (A&P Br. 39-40). There, the Commission itself held that "precisely meeting the exact prices of competitive bids can have no realistic meaning in the context of . . . a winner-take-all, bidding situation". *Beatrice Foods Co.,* 76 F.T.C. 719, 811 (1969), *aff'd sub nom. Kroger Co.* v. *FTC,* 438 F.2d 1372 (6th Cir.), *cert. denied,* 404 U.S. 871 (1971).[14]

[14] The Commission, in an effort to place an additional obstacle in the path of A&P's reliance on the meeting competition defense, notes that the defense is not available "if A&P's motives were to undercut the competition" (FTC Br. 45). There is no record

## II.

## The Commission Failed to Establish That Borden's Prices Were Not Cost Justified and That A&P Knew It.

The clear holding of *Automatic Canteen Co. of America v. FTC,* 346 U.S. 61 (1953), was that, where the method by which or quantities in which a buyer purchases differs from his competition, the Commission must show actual lack of cost justification as well as knowledge thereof by the buyer (A&P Br. 42-46). The Commission rejects *Automatic Canteen* in favor of its own decision in *Suburban Propane Gas Corp.,* 71 F.T.C. 1695 (1967), to conclude that even when methods or quantities of purchase differ (as here), a *prima facie* case can be established without a showing that cost justification did not in fact exist (FTC Br. 46, 55).

Building on this choice of precedents, the FTC then seeks to dispute the clear record evidence concerning the differences in the way A&P and its competitors were served and attempts to charge A&P with knowledge of the "fact" that the differences were "often minimal" (FTC Br. 47). The only support offered for this claim is limited to a few stores in Indiana, with no attempt to show that A&P knew or should have known the details of their dealings with Borden.[15] The "evidence" the Commission relies on is

citation for this unwarranted innuendo, as indeed there could not be. The evidence clearly demonstrates that A&P's sole desire in its private label negotiations was the legitimate aim of improving its gross profit position in regard to milk and dairy products.

[15] Nowhere in its brief does the Commission assert that A&P's Illinois stores received the same service as Borden's other retail customers. In Illinois, the uncontradicted testimony was that all of the allegedly injured customers for whom complaint counsel presented evidence of price discrimination (A3673-76) received full service delivery. The Borden Branch Manager at the O'Hare Branch testified to this effect (A3103-04) and Mr. Havemeyer, a dairy cost accountant, expressed the same opinion based on the testimony of the only two Illinois store owners who testified, a

some testimony by Mr. John Szczepaniak, an assistant route foreman of Borden's Hammond, Indiana branch. He said that, although A&P preordered its merchandise (as opposed to Borden's other customers), this was not significant in his area because the driver knew from experience the approximate amount that each store would need each day (FTC Br. 47). The implication here is that the driver's knowledge of the stores' needs was equivalent to preordering. Yet Mr. Szczepaniak testified that the driver would go into the store to check the stock in the dairy case to see what was "on hand", check against his route book to see what was normally required and then furnish the store with the difference (A2122). It is obvious that this is considerably more time consuming than merely being handed an order for the next day's delivery from an A&P store.[16]

Apart from the above, the Commission's assertion that Mr. Szczepaniak's testimony is the "only first-hand evidence of record concerning the comparative services all these stores received" (FTC Br. 47, n.19) is simply incorrect. Based on the testimony of the allegedly disfavored customers themselves and on a stipulation of the parties, Mr. Havemeyer concluded (A2836, 4496-5000, 5776) that all of Borden's allegedly injured Indiana customers received services or benefits not provided to A&P—including merchandising, branch selling, advertising support and extension of credit (see A639, 771-78).[17]

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stipulation of the parties (A4492-95) and an analysis of the Borden route book notations as explained by the O'Hare Branch Manager (A2998-3004, 5414, 5717; see A638-40).

[16] Mr. Szczepaniak also noted that the orders were always ready for him when he arrived at the A&P stores (Szczepaniak 1308-09).

[17] Commission counsel's flat statement that the A&P store and the competing Tittle store in Valparaiso, Indiana received the "exact same services" (FTC Br. 47) is not correct. Although Borden's Valparaiso distributor testified that the method of delivery was the same in both stores, A&P's cost study (A5775) showed that, when other services and selling expenses are taken

With respect to A&P's awareness of Borden's prices to others, we note initially that the Commission does not dispute the fact that there was no evidence that A&P knew at what prices or in what quantities its competitors were buying or what services its competitors were receiving (A&P Br. 47-48). Instead, it claims that A&P's knowledge is irrelevant (p. 58) because A&P had a duty to inquire to determine such matters, asserting that "Borden's prices were set according to *published* price lists and discount schedules" (FTC Br. 58-59). But any inquiry (assuming one was in fact required) would have been futile. As indicated in our main brief, the prices charged by Borden and other dairies varied so dramatically from any "published" prices that there were no "regular prices" (A&P Br. 49-50). Indeed, the record indicates that *none* of the allegedly discriminated against Borden customers in Illinois at *any* time paid Borden according to its "published" price and discount schedule; instead, each of them paid less in varying amounts (see p. 28, n.27 below).[18] Under these circumstances, one could hardly expect full disclosure from either Borden (which kept its prices to other customers a secret from A&P) or A&P's competitors (who had no reason to tell A&P their costs). And even if this crazyquilt patchwork of prices had been known to A&P it would have been

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into account, there was a net discrimination in *favor* of the Tittle store—even without considering such important items as the return of outdated merchandise (which A&P was not privileged to return) and Borden label merchandising expenses (A798, 826). In addition, A&P's Valparaiso store manager testified that, as required by A&P's private label arrangement with Borden, he preordered merchandise (Cooley 5841-43) whereas the Tittle store did not (A1564-66).

[18] As the Commission noted in *Admiral Corp.*, 67 F.T.C. 375, 426 n.2 (1965): "In addition to the dearth of evidence in this record that the price lists relied upon were actually followed, there is a showing that the net prices to the various customers were so complicated and modified by a confusing welter of deals and discounts as to make respondent's price lists almost useless."

impossible for A&P to conclude from it that the prices to it could not have been cost justified.

We have in our main brief demonstrated the unreliability, both individually and in toto, of the six factors relied on by the Commission as evidence that A&P knew that the Borden offer could not be cost justified (see A&P Br. 49-53). A few additional comments are appropriate concerning the Commission's discussion of those factors in its brief (FTC Br. 48-55).

(1) *A&P paid higher prices for Borden label than for private label milk* (FTC Br. 48). The Commission argues that A&P knew or should have known (a) "that the methods of service and the quantities it purchased were the same as those of its competitors", and (b) that A&P's competition was not paying less than A&P for Borden brand milk, particularly since Borden had a "published limited service" discount of only 2%; from this, they conclude that A&P is chargeable with knowledge that the private label prices to it were discriminatory (FTC Br. 48). Not only does the FTC offer no reason as to why A&P knew or should have known of these items, but there is incontestable evidence to the contrary. The plain fact is that the method of service and quantities delivered to A&P differed considerably from its competitors. Further, A&P never received any so-called "published" discount schedule because they were not disseminated to chain stores, and did not know what its competitors were paying (see A&P Br. 49-50). Despite the Commission's assertion that this "published service-discount program was available to all stores purchasing Borden label products" (FTC Br. 48), only *one* of the seven Borden customers who were called as witnesses by complaint counsel was even aware of the discount schedule for reduced services—and that one did not take the service discount (A1104-05, 1136, 1359-60, 1467, 1512-13, 1596; Gintert 2522-23). When the very customers to whom such prices and discounts were supposedly offered were un-

aware of them, how can A&P be charged with knowledge of them?

Moreover, even if A&P had such knowledge, it would still not have had any reason to conclude that the 2% which Borden offered as an inducement to others to forego certain services was also the upper limit of the cost savings associated with the Spartan service Borden gave to A&P. The modified services contemplated by this discount schedule were far more extensive and costly than those provided to A&P.[19]

(2) *Borden's advice to Schmidt that Borden was "meeting a competitive bid" was "a clear warning that Borden's prices . . . could not be cost justified"* (FTC Br. 49). The unfairness of this attempt to read so much into Mr. Minkler's oral comments at a VFW hall has been shown elsewhere (pp. 7-8 above).

(3) *Borden's written assurance of legality did not specify availability to A&P's competitors on proportionally equal terms* (FTC Br. 50). The Commission contends that Borden's October 1, 1965 letter (A4460) stating that its prices were "proper under applicable law" was a "complete departure from the usual explicit guarantee to A&P of proportional availability" (FTC Br. 50). At the hearing, however, not only did complaint counsel strenuously oppose

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[19] Under the private label program, Borden's salesmen's services to A&P would be strictly limited (A3490), "merchandising materials, price promotions, demonstrators or special displays" (A3490) were not available to A&P, nor was the benefit of Borden's advertising. No similar elimination of services was imposed by the terms of the January 1966 Borden discount schedule (A3580). The cost of these services which A&P did not receive is significant. In Illinois, they amount to $.016036 per point for branch selling expenses, $.000666 for advertising and $.008630 for merchandising expenses, or a total of $.025332 per point (A703-31). On an average list price of $.25 per point (A703-31), the cost of these services come to 10% of the list price. In addition, A&P ceased to receive special price promotions which had amounted to $2,700 per week prior to the private label program (A1965, 2230-32).

the introduction by A&P of this letter (Minkler 387-93), but they did not introduce any examples of any other kind of letter of availability from Borden to demonstrate Borden's "usual explicit guarantee". As stated in our main brief, the wording used in the October 1 letter was specifically interpreted by Borden in writing as covering availability under the Robinson-Patman Act (A&P Br. 50-51).

The Commission also states that Borden removed the legend "these prices are available to all on proportionally equal terms" from private label "pricing sheets" given to A&P while retaining such language on pricing sheets pertaining to Borden label sales to A&P (FTC Br. 50-51). The record totally contradicts this assertion. Mr. Tarr, whose testimony is cited by the Commission in support of its argument, testified that this legend was discontinued on *all* the "pricing sheets" (actually price change tables that Borden submitted on a special form made up for A&P) whether pertaining to Borden label or private label (Tarr 944-45). Moreover, an examination of the price change tables, on which the Commission relies (A3585-668), does not reveal any consistent or probative pattern in the inclusion or exclusion of this legend. Although the Commission refers to *private label* price sheets given to A&P, all but one of the 84 price change tables put in evidence by complaint counsel pertain to Borden label products (A3634). The proportionally available statement was included in some of the Borden label tables and omitted from others in hit-or-miss fashion and did not appear on the single private label table. It is obvious that no inference helpful to the Commission's case—let alone knowledge on the part of A&P of a lack of cost justification—can be drawn from this confusing and inconsistent history.

(4) *Cost data which Borden gave A&P showed Borden would "at best realize a marginal profit"* (FTC Br. 51). The Commission contends that the significance of the so-called

Malone cost data was that it "put A&P on notice" that the private label discount could drastically affect Borden's profits and thereby imposed on A&P the "duty to inquire". All of these exhibits were prepared before Borden even knew what cost savings would result from the new limited service system to be provided to A&P from the new Woodstock plant; instead, Mr. Malone only purported to set out Borden's average costs of serving all its customers under full service conditions from its old plant (A4219-20). One of the exhibits cited, CX 54, was never submitted to A&P (A4219-4229) and the other four examples given of "detailed cost data" (A3306-23, 3328) were of the kind more accurately described in Mr. Minkler's testimony as "sales tools". They were prepared by Mr. Malone to respond to A&P's observation that certain earlier figures submitted by Borden in support of its Chicago bid were "substantially above similar costs in [the] Metropolitan New York market" (A3306). An examination of the resulting apologia submitted by Borden (A3306-23, 3328) and a comparison of it with other documents prepared by Borden confirm that skepticism on the part of A&P's buyer was well warranted. (Such a comparison was set forth in A&P's proposed findings of fact submitted to the Administrative Law Judge, A445-53.)

In other words, the very documents which the Commission claims imposed on A&P the duty to inquire were, in fact, a calculated response to an inquiry by A&P (expressing doubt as to the alleged disparity between Borden's costs in Chicago and New York) and further inquiry by A&P would have been futile. While an audit of Borden's costs might have yielded more reliable information, it was contrary to Borden's policy to give more detail. In connection with A&P's 1971 review of private label prices, A&P requested Borden to submit a "cost justification analysis" of their proposal (A6023). Borden declined to furnish such information, stating: "A cost justification analysis must of necessity involve the disclosure of confidential data

regarding our operation . . . . *It has never been our policy to disclose such information to any customer or competitor.*" (A6026).[20]

(5) *A&P's "trade experience" should have given it reason to believe that Borden's private label prices could not be cost justified* (FTC Br. 52-53). The contention that A&P's purchase of Borden label milk at higher prices somehow put A&P on notice of lack of cost justification has been answered previously (pp. 18-19 above). The Commission next asserts, without any elaboration or citation, that "A&P's extensive knowledge of the trade was easily sufficient to give it reason to know that Borden's private label prices could not be cost justified" (FTC Br. 52). This conclusory allegation adds nothing.[21]

(6) *In May 1966 A&P refused to accept a price increase on its private label products* (FTC Br. 53-54). The Commission asserts that A&P, by refusing to accept the full amount of a requested private label price increase in 1966-1967, while paying the few mills increase on Borden label products, was widening the "existing discrimination" in price between Borden label and A&P label products. This proves nothing about the relationship between the prices A&P and others were paying and whether any difference was justified. Quoting its own opinion, the FTC's brief also asserts that A&P's acceptance of this small increase on Borden label products "suggests an awareness on its part

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[20] In any event, Borden did not prepare a study of the cost of supplying private label products to A&P either before or after its final offer to A&P (A1779-80).

[21] To the contrary, it was uncontradicted that Mr. Schmidt, A&P's Unit buyer for thousands of items in the Chicago area, was an inexperienced and less than knowledgeable purchaser of milk and dairy products (A&P Br. 5). The FTC brief does not dispute this, but does assail A&P's reliance on the 2-2-2 formula used as a guide to measure dairy costs and profits in New York and elsewhere (A&P Br. 20-21), contending that dairy costs in Chicago were higher than the rest of the country (FTC Br. 53). If that was a fact (and we have only Borden's "sales tools" to support it) there is no reason to suppose that Mr. Schmidt knew it.

that Borden label milk sales to A&P's competitors were on the same delivery terms. . ." (FTC Br. 54). This is a complete *non sequitur*. The Commission nowhere states how it follows, from A&P's acceptance of increases of a few mills based principally on container costs and social security costs, that A&P knew that its competitors received the same delivery terms as A&P (which they did not, pp. 15-16 above).

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In order to avoid the necessity of adducing evidence showing that there was no cost justification and that A&P knew this to be a fact, the Commission seeks to impose on A&P a requirement of showing that the same "price-service package" granted to A&P was made available at the same discount to competing purchasers (FTC Br. 60-61). The Commission argues that "Borden offered the same service terms to all stores in the relevant areas. . . . However, in contrast to the great savings granted to A&P on private label, Borden offered only 2% additional discount in its published offer to competing stores" (FTC Br. 60). Actually, this statement is misleading. The offer was neither published, nor did it offer the same services, nor was the discount only 2%; instead, A&P and most other Borden customers knew nothing about this modified limited service, which still included services unavailable to A&P, and it was part of a schedule giving volume discounts of up to 26% in addition to the 2% for this limited service option (A3571-73, 3580).[22]

We noted in our initial brief (p. 51, n.42) that the language of Section 2(a) of the Clayton Act imposes no re-

[22] There was no proof of any non-A&P store receiving the same services at a less advantageous price, or even that any Borden customer accepted the terms of service set out in this price list; indeed most of Borden's customers were completely unaware that such a price list existed (see pp. 18-19 above). Hence, even if this discount schedule had offered the same limited service terms as A&P received but at a smaller discount, there is no proof of any actual price discrimination resulting from that offer.

quirement that cost justified prices be offered to others on proportionately equal terms.[23] Where a buyer negotiates a lower price based on a package of services less than those generally offered, he should be able to accept the proposal without proof that it will be made available to everyone. Although a seller may raise the fact of "availability" to defeat a Section 2(a) charge,[24] it does not follow that lack of availability, by itself, creates a Section 2(a) violation; the statutory elements must still be established and the statutory defenses—meeting competition and cost justification—are still available.[25] In sum, we submit that Section 2(a) does not prevent a seller from giving a particular customer a better price than that generally offered provided that such a price is necessary to meet competition or is cost justified. If a seller's prices are cost justified, they are not actionable in spite of the fact that

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[23] In *Kirby* v. *P.R. Mallory & Co.*, 489 F.2d 904 (7th Cir. 1973), *cert. denied*, 417 U.S. 911 (1974), the Court rejected the theory that Sections 2(d) and (e), which contain the "proportionally equal terms" requirement, prohibit transactions which are governed by Section 2(a) and are protected by the defenses available under that Section. It stated that Congress imposed stricter standards of legality respecting promotional discrimination than price discrimination. "Price discrimination is lawful if it can be justified under several exculpatory provisos or has no effect on competition. In contrast, promotional discrimination is illegal per se, irrespective of competitive impact and without resort to statutory justification." (489 F.2d at 910).

[24] *E.g.*, *FTC* v. *Borden Co.*, 383 U.S. 637, 646 (1966); *Tri-Valley Packing Ass'n* v. *FTC*, 329 F.2d 694, 703-04 (9th Cir. 1964), *on remand*, 70 F.T.C. 223, 274 (1966), *modified and aff'd sub nom. Tri-Valley Growers* v. *FTC*, 411 F.2d 985 (9th Cir.), *cert. denied*, 396 U.S. 929 (1969).

[25] Millstein, *The Status of "Availability" under Section 2(a) of the Robinson-Patman Act*, 42 N.Y.U. L. Rev. 416, 420 (1967) states that Section 2(a) does not concern itself with the "availability" of a lower price, but instead looks only to the actual prices charged customers—citing *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 549-51 (1960), holding that a "price discrimination" within the meaning of Section 2(a) was merely a price difference.

they are not made available proportionately to all other purchasers.[26]

We do not contend (as suggested at FTC Br. 61) that competitors could be charged more for the same service package with impunity. Assuming the "meeting competition" defense was not applicable, A&P's competitors had the right to a price which exceeded the A&P price by no more than the difference in the cost of serving them. If they received the same service and paid more, or if they received more service but paid a price higher than the difference in the cost of service, they could recover treble damages. However, that does not mean that a buyer such as A&P has the burden of showing availability to others of the same service package on proportionately equal terms.

## III.

### The Commission Improperly Rejected A&P's Cost Studies.

While the Commission devotes a substantial portion of its brief to a critique of A&P's cost justification studies (pp. 62-75), it misses the forest for the trees. It is so obsessed with picayune quibbles as to various allocations and judgments made by Mr. Havemeyer, whose professional career, according to the Administrative Law Judge "has been very largely devoted to cost accounting in the dairy industry" (A966), that it fails to heed the principles expressed in *FTC* v. *Standard Motor Products, Inc.*, 371 F.2d 613 (2d Cir. 1967). There, this Court stated that unless respondent's allocation was "demonstrably irrational" or

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[26] Indeed, former Representative Wright Patman, one of the coauthors of the Act that bears his name, introduced a bill in 1967 that would have amended Section 2(a) to require a seller offering favorable treatment to one customer to notify others of such offer and to make it available to them within five days after the favored customer receives it. H.R. 6843, 90th Cong., 1st Sess. (1967);

out of accord with accepted accounting principles, it should be accepted. The Court cautioned against the rejection of otherwise proper cost studies solely on the ground of conflicting subjective judgments. "The inevitably judgmental character of cost allocation might otherwise go far toward making the cost justification defense an illusory one in practice." *Id.* at 622 (citing F. Rowe, *Price Discrimination under the Robinson-Patman Act* § 10.13 at 307 (1962)). The Commission's preference for its own method of allocation—in *Standard Motor Products* a Commission witness testified that its method was "more proper"—is an insufficient reason to reject a respondent's cost justification study. *Id.* at 622 and n.14.

Yet this is precisely what has occurred as can easily be shown by a few examples. The Commission contends that Mr. Havemeyer's practice of allocating central office overhead expenses on the basis of the percentage of branch expenses attributable to A&P and to the competing stores is improper (FTC Br. 71-72). The Commission's own expert (Mr. Lemberg, who testified in rebuttal to Mr. Havemeyer) stated that Mr. Havemeyer's allocation was the "usual way to do it", but that Mr. Lemberg would prefer that those expenses that could be "directly charged" be removed (FTC Br. 72). The Commission also disputes Mr. Havemeyer's allocation of drivers' commissions on a time basis (*i.e.,* the amount of time spent at a particular store). Although Mr. Lemberg, when asked whether commissions "are frequently allocated by cost accountants on a time basis", replied: "It would be. Circumstances might permit that in some cases" (FTC Br. 73-74), Mr. Lemberg's "position" was that they should here be allocated according to delivery volume (FTC Br. 74).

Clearly, the Commission is disputing Mr. Havemeyer's cost studies only because it believes its methods of alloca-

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Millstein, *supra,* at 436 n.66. This bill apparently was never reported from the House Judiciary Committee.

tion are "more proper"—and not because his method was "irrational" or in conflict with accepted accounting principles. Just as clearly, A&P's cost studies meet the requirements set forth by this Court in *Standard Motor Products, supra*—that the cost justification be established by " 'concrete and specific evidence,' rather than by 'conjectural accounting estimates alone' ". *Id.* at 622 n.15.

Finally, it must be emphasized, as we noted in our main brief (pp. 57-60), that the Administrative Law Judge's refusal to permit A&P to use either the "time standards" (for the performance of delivery functions) prepared by Mr. Havemeyer's Case and Company in the ordinary course of business, *or* the time standards from an official publication of the Wisconsin Department of Agriculture (co-authored and introduced by the Commission's expert witness, Dr. Lyle Solverson) when A&P was faced with reconstructing conditions in Borden's Chicago dairy operations long after the event, renders the cost justification defense "an illusory one in practice".

## IV.

**The Evidence That A&P Was the Beneficiary of Price Discrimination Lacks Probative Value.**

In our initial brief, we cited a number of record instances of Borden's offering private label milk to competitors of A&P in the Chicago area—including Kroger, National Tea, and Eagle Food Centers, among others (A&P Br. 21-22). The Commission's brief first flatly states, without *any* record reference: "private label milk was not made available by Borden to competitors of A&P" (p. 21, n.8); it thereafter admits that private label offers were made but asserts that some of them were "not as good as the A&P deal" and all of them are "irrelevant" because they were made to chain stores (FTC Br. 30, n.14). We also pointed out that the Commission's evidence of rebates and other allowances to

"unfavored customers" was incomplete and did not take into consideration the value of the additional services these other customers received (A&P Br. 66-71). The Commission's brief brushes these deficiencies aside with such misleading generalities as "they [the unfavored customers] either received one rebate check per month or were billed net" (FTC Br. 28). The facts are that no single rebate check took care of all allowances (which included interest free loans, freezers and other benefits not made available to A&P, A454-62) and there were no net billings to "unfavored customers" comparable to the "net of all services" billings to A&P.

Beyond this, the Commission defends its comparison of the total dairy purchases of Borden's non-A&P customers in the Chicago area with A&P's purchases of only private label items by claiming that the relevant exhibit (A3673-76) "compares *only* percentage discounts" and "the percentage discount to the competitors could be computed by comparing the rebate to any competitor with its total purchases" (FTC Br. 24). This explanation misses the point. Apart from the facts that the prices paid by the non-A&P customers were not based on a discount applied equally to all purchases,[27] the comparison still remains one of apples

[27] The Commission cites two Borden discount schedules, CX 120 and 138 (A3580), and claims that "Borden's discounts to the trade on Borden label products, however, were based upon a percentage of total purchases" (FTC Br. 24). The entire record amply demonstrates that the rebates actually paid to the allegedly injured customers were not determined pursuant to the schedule in CX 138 (which superseded CX 120), but rather on a different, inconsistent and unexplained basis. Borden's other documents revealed that most of its customers received more than they would have been entitled to receive under the discount schedule (A3033). For example, the random information A&P obtained about allegedly injured competitors showed that one customer received a discount 12% higher than that called for by the discount schedule (A3034) and four received discounts almost 10% above the published schedule (A3032-35). No evidence was presented that even *one* of the allegedly injured customers on the O'Hare route was charged in accordance with the schedule. In addition, Mr. Rouse, Borden's

and oranges (*i.e.*, for A&P, the percentage is based solely on private label purchases; for the non-A&P customers, the percentage is based only on monthly rebates for total dairy purchases).

The Commission's answer to A&P's assertion that the Indiana comparison of only part of the line of milk and dairy products purchased is also faulty (A&P Br. 66) is that, since A&P and Borden selected the items to be covered by the private label agreement, the Commission's price comparison need not include A&P's purchases of Borden label products. Surely this "reasoning" does not justify the economic absurdity that results from comparing only that part of the mix of Borden products sold by A&P and its competitors which was sold under different labels by each. The Commission depends mainly on the authority of the *Beatrice-Kroger* case (FTC Br. 25-26), but fails to refer to the distinguishing features of *Beatrice-Kroger* which we noted in our main brief (pp. 67-69).[28]

The Commission also argues that the purchases of the entire line need not be aggregated because A&P's purchases

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Chicago Office Manager, stated that he did not know whether the rebates reflected on the check registers could be applied across-the-board against all of the items purchased by a customer (A1834).

[28] In our initial brief (p. 68), we noted that the hearing examiner in *Beatrice* believed that brand and private label sales should be aggregated in determining discrimination. The Commission's brief attempts to negate this reference by quoting, out of context, the Commission's "we disagree" comment in that case. An examination of the relevant portion of the Commission's opinion in *Beatrice* shows that this disagreement was not so much with aggregating brand and private label sales but with the hearing examiner's conclusion that the effect of the discriminations was to be determined by comparing the *average* unit price which all Kroger stores paid to Beatrice with the average unit price Beatrice charged Kroger's competitors. The Commission held that consideration of secondary line injury must be determined on a location by location basis and noted that, in many markets, no brand label products were sold to the Kroger stores and their prices were substantially below the brand label prices charged to competitive stores.

of Borden brand products was not really significant (FTC Br. 26, n.12). This simply is not so. During the time period of complaint counsel's price comparisons (1966-1967), A&P's purchases of Borden label items constituted about 40% of its total purchases from Borden (A&P Br. 65, n.54; 69, n.58). It was not until 1970, well after the introduction of the private label program, that the number of items available to A&P under private label was significantly increased (see, for example, A3679-717). Even then, A&P continued, throughout its relationship with Borden, to purchase items in Borden label which were not available in private label. There is also no basis for any assumption that the exclusion from consideration of items not purchased by A&P in private label made no difference in complaint counsel's comparisons; their own exhibits reveal that, even in the period June 1969-March 1970, the percentage of non-common milk and dairy items purchased by the allegedly injured customers amounted to a substantial portion of their total purchases (A&P Br. 66, n.55).

The Commission attempts to respond to A&P's argument (A&P Br. 66-67) that the rebate checks relied on by the Commission's accountant in preparing the Indiana exhibits were proven to be incomplete by claiming that "Borden's official supervising the subpoena return, Mr. Rouse, made it clear that Borden was supplying a complete set of requested documents" (FTC Br. 27). Mr. Rouse simply stated that he had produced certain records at an earlier date in response to a Commission subpoena, and that some documents on the table in the hearing room (without any further identification) were similar to those he had previously produced (A1813-15, 1817, 1820, 1822-23). All Mr. Rouse could state as to the completeness of these records was "if [complaint counsel] have shown me all of these records that I turned over, they are all here" (A1818). This tautology is clearly not a representation that all of the subpoenaed documents were turned over. He could

not state where the records he saw came from, except that some came from his office and some did not; he apparently did not collect them himself (A1811, 1825-26).

Again echoing the opinion below (A1034), the Commission contends that differences in service, which we have asserted constitute indirect price concessions (A&P Br. 67, 69-71), "are more properly considered under the question of cost justification rather than under the question of prices paid" (FTC Br. 29). We submit that the substantial differences in service between A&P and Borden's other customers (pp. 15-16 above) is relevant to price, and that the Commission here has improperly shifted to A&P the burden of proving that there was no price discrimination. It has done so by the dual device of excluding the service differences from the price comparison (as being more relevant to cost justification) and then placing on A&P the burden of proof on the cost justification defense (despite *Automatic Canteen*). The result is to relieve the Commission of its fundamental duty of showing by substantial evidence the existence of a price discrimination.

Finally, we note briefly that the Commission does not adequately answer our contention that showing a "flow of commerce" is not enough to support the exercise of Robinson-Patman Act jurisdiction in regard to A&P's Illinois purchases. It must be also shown that one of the two purchases involved in a purported discrimination actually crossed a state line (A&P Br. 72-74). The Commission's alternate contention that the Illinois sales are subject to Robinson-Patman Act jurisdiction because "the private label contract was multi-state in nature" (FTC Br. 15) is equally unsupportable. As we noted in our main brief (pp. 75-76), there was no firm long-term contract covering both interstate and intrastate sales, but only a terminable-at-will arrangement under which some sales were made to Illinois stores and some sales were made to Indiana stores. The Commission cites no legal authority for its claim that "every

sale by Borden to A&P, under this agreement, was in interstate commerce" (FTC Br. 20) and we are aware of none.[29]

## V.

**The Order of the Commission Was, in Any Event, Unnecessary.**

In its assertion that a cease and desist order is appropriate in this case, the Commission is adhering to an erroneous standard—that there is no "guarantee" that the practice found to be illegal would not be resumed (FTC Br. 78). Under such a test, cease and desist orders would be appropriate in every case because there can never be an absolute guarantee that illegal conduct will not occur in the future. The proper test, as we noted in our main brief (pp. 80-81), is whether illegal conduct may *reasonably* be expected to occur in the future.

The private label arrangement with Borden was terminated by A&P in 1972 at about the same time that A&P centralized (in its national headquarters) its purchases of milk and dairy products (A&P Br. 78). The Commission says that these two factors "are insufficient assurances that the unlawful inducement of discriminatory prices will not be repeated" (FTC Br. 78) but advances no explanation for this statement or for a belief that future illegal conduct *can* reasonably be expected. The Commission also states that A&P's discontinuance of its private label arrangement with Borden occurred some four months after issuance of the complaint (FTC Br. 77), but offers no argument on the critical question of whether the discon-

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[29] Indeed, the Commission seems to concede that some of the Illinois sales (i.e., of whipped cream, sour cream and other products which resulted from substantial changes in the raw milk delivered from out of state) were not in interstate commerce (FTC Br. 19, n.7).

tinuance of the challenged practice was in good faith (A&P Br. 80).[30]

In its attempt to justify the portion of its order in which it shifts from the Commission to A&P the burden of proof on the meeting competition defense, the FTC's brief claims that this requirement is reasonably related to the unlawful practice found to exist. The Commission has contended throughout its brief that this case is analogous to *Kroger* (*e.g.*, FTC Br. 83). While we continue to insist there is no valid comparison between the "lying buyer" in *Kroger* and the "silent buyer" here, it is highly inconsistent for the FTC to seek an order against A&P that is considerably more severe than the order entered against Kroger.[31] This is especially true in view of the far more egregious nature of the violation in *Kroger*.

Finally, we must take strong exception to the portion of the Commission's opinion (cited in its brief at p. 83), referring to the "likelihood that A&P knew that it was violating the Robinson-Patman Act". The record is at least clear that any meeting competition remarks purportedly made by Borden's representatives to Mr. Schmidt were never reported to any of Mr. Schmidt's superiors either in Chicago or New York, and that (if they were made) they were not made in any meaningful way and Mr. Schmidt did not appreciate the legal significance now attributed to them. These facts, and the further fact that

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[30] The change in suppliers that occurred in February 1972 was the result of negotiations begun in April 1971, prior to receipt of the proposed complaint in June 1971 (A&P Br. 80). These negotiations were initiated by Mr. Edmund R. Bayma shortly a[illegible]r he became Chicago Division Purchasing Director (A2269).

[31] The operative paragraph of the order entered by the Commission against Kroger required that company to cease and desist from:

> "Knowingly inducing, or knowingly receiving or accepting, any discrimination in the price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price respondent knows or should know is below the net price at which said products of like grade and quality are be-

the Commission here is advancing a novel legal theory, demonstrate that this was no knowing violation by A&P—if indeed there was any violation at all.

## CONCLUSION

For the reasons demonstrated above and in our main brief, the decision appealed from should be reversed and Count II of the Complaint should be dismissed. Alternatively the Commission's order should be vacated or modified as indicated.

Dated: New York, New York
February 11, 1977

Respectfully submitted,

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ing sold by such seller to other customers where respondent is competing with the purchaser paying the higher price or with a customer of the purchaser paying the higher price."

This order preserved for Kroger the usual "meeting competition" and "cost justification" defenses, *FTC* v. *Ruberoid Co.,* 343 U.S. 470 (1952), and left the burden of proof on these with the Commission. *Mid-South Distributors* v. *FTC,* 287 F.2d 512 (5th Cir. 1961).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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|---|---|---|
| THE GREAT ATLANTIC & PACIFIC TEA COMPANY, | : | AFFIDAVIT OF SERVICE |
| Petitioner, | : | |
| -against- | : | |
| FEDERAL TRADE COMMISSION, | : | |
| Respondent. | : | |

- - - - - - - - - - - - - - - - - - - - - - - - - - - x

STATE OF NEW YORK )
: ss.:
COUNTY OF NEW YORK )

ROBERT R. CAWTHRA, being duly sworn, deposes and says:

1. I am over the age of 18 years and not a party to this action.

2. On the 14th day of February 1977, I served two (2) copies of the Reply Brief of Petitioner upon:

Baldwin Ogden, Esq.
Office of the General Counsel
Federal Trade Commission Building
Washington, D.C. 20580

by depositing true and correct copies thereof at the Post Office maintained by the United States Postal Service at 73 Pine Street, New York, N.Y. 10005, enclosed in a stamped, sealed envelope addressed to said attorney.

Robert R. Cawthra

Robert R. Cawthra

Sworn to before me this
14th day of February, 1977

Robert F. Belluscio

Notary Public

ROBERT F. BELLUSCIO
Notary Public, State of New York
No. 31-4625331
Qualified in New York County
Commission Expires March 30, 1978

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